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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CYNTHIA HARRIS,

Appellant,

v.

THE CITY OF BIRMINGHAM, *ET AL.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

The Motion to Dismiss or Affirm is as remarkable for what it does *not* argue as for what it does. The City does not deny -- as, indeed, it could not -- that Ala. Act No. 91-187 ("the Dog Racing Act") contains a number of "voting qualification[s]" and "standard[s], practice[s], or procedure[s] with respect to voting." Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c. Among other things, the Dog Racing Act: (a) requires the holding of a special election in Birmingham to decide whether to authorize pari-mutuel betting on greyhound racing; (b) restricts the electorate for that election to only a portion of

Birmingham's electorate; (c) forbids the City from holding such election in conjunction with mayoral or councilmanic elections; and (d) prescribes the form of the ballot.

Nor does the City deny -- with one minor, and mistaken, quibble[1] -- that the voting-related provisions of the Dog Racing Act are "different from those in force or effect on November 1, 1964." Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c. The Dog Racing Act requires an election where none was required before; de-annexes part of Birmingham for the purposes of holding that election; and creates a new set of appropriate dates on which to hold that election. *See* Jurisdictional Statement at 10-12.

That would seem to be the end of this case. Appellees enacted and sought to administer unprecleared election-law changes. Far from asking this Court to

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[1] The City repeats the erroneous supposition of the court below that because voters in Shelby County did not vote in the 1984 *horse* racing referendum, including them in the 1991 *greyhound* racing referendum would have constituted a change requiring preclearance. This supposition is wrong for at least two distinct reasons. First, in 1984, no part of Birmingham lay within Shelby County. *See* Juris. St. at 3 n. 2. Subsequently, Birmingham annexed a portion of Shelby County. In 1984, *all* Birmingham residents were entitled to vote in a referendum concerning whether to permit pari-mutuel betting within the city, while in 1991, *some* Birmingham residents were barred from voting in such a referendum. This clearly constitutes a "change." Second, there was *no* pre-existing definition of the scope of the franchise for greyhound racing referenda in Class 1 municipalities prior to the passage of the Dog Racing Act. Thus, the Act's definition represents a "change" from pre-existing law. Surely if the Legislature had passed a law saying that only persons eligible to vote in the 1984 referendum could vote in the 1991 referendum, the City would concede that such a law required preclearance. If that is so, then there is no basis for exempting the Dog Racing Act.

summarily affirm the decision of the Court below, they should have confessed error. (The City does seem to be confused about these questions in view of its admission that it never sought preclearance for the 1984 referendum on horse racing *either*, *see* Motion to Dismiss or Affirm at 2.)

Instead, the City advances three arguments. First, it suggests that because black voters in Birmingham support the establishment of a pari-mutuel greyhound track, the failure to preclear the Dog Racing Act should be overlooked. *See* Motion to Dismiss or Affirm at 3-6 and 8. Second, despite the fact that Congress squarely reserved questions of actual discriminatory purpose or effect for the Attorney General or the District Court for the District of Columbia, the City argues that the changes at issue were *de minimis* or benign. *See* Motion to Dismiss or Affirm at 7-8. Third, the City claims that this controversy is moot because, appellant's request for an injunction having been denied, the August 27 special election has occurred. *See id.* at 9. Each of this arguments is completely meritless.

I. WHETHER BIRMINGHAM'S BLACK CITIZENS WANT A DOG RACING TRACK IS COMPLETELY IRRELEVANT TO THE QUESTION OF SECTION 5 COVERAGE

Much of the City's motion, and virtually all of their 62-page appendix, is aimed at showing this Court that Birmingham's black voters favor greyhound racing. That, however, is simply not at issue in this § 5 coverage proceeding. If the voters decide in a fairly conducted election to authorize pari-mutuel dog racing, appellant has absolutely no Voting Rights Act objection to that

determination. She merely seeks to ensure that black voters *are* given that fair opportunity to make their voices heard. Section 5 of the Voting Rights Act was intended to provide federal oversight regarding election law changes in covered jurisdictions, such as Alabama, precisely because of the historic danger that, both intentionally and inadvertently, black voters were denied an equal opportunity to participate in the political process. As we explain below, there is a substantial danger in this case that election procedures mandated by the Dog Racing Act *do* discriminate against black voters.

In any event, whether preclearance was required is completely independent of the merits of the referendum. Preclearance, as its name implies, must take place *before* a change is implemented. *See Clark v. Roemer*, 111 S.Ct. 2096, 2101 (1991). Section 5 was intended to be a "self-monitoring" provision, *id.* at 2104, under which covered jurisdictions would seek preclearance without first being hauled into court. Thus, at the time that the Dog Racing Act and the Birmingham and Jefferson County resolutions should have been submitted for preclearance, the likely outcome of the referendum, or the motives of private attorneys general who might seek to enforce § 5 if the City flouted the law, were entirely conjectural, besides being utterly irrelevant to the legal duty to seek preclearance. Indeed, given appellant's conceded standing, her reasons for seeking to enforce § 5 are wholly beside the point.[2] In fact, in several of the cases relied on most heavily by the City, the plaintiffs were candidates for office who sought

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[2] Birmingham's frenzied references to how "economic interests," "pawn[s]," "fronts" "nominal" parties, and outsiders from Greene County are seeking to "pervert" section 5 of the Voting Rights Act of 1965, *see* Motion to Dismiss or Affirm at i, 3, 4, n.5, and 8, speak for themselves.

to use § 5 to aid in their own elections, certainly a self-interested motivation. *See, e.g., Dougherty County Board of Education v. White,* 439 U.S. 32, 34 (1978); *Perkins v. Matthews*, 400 U.S. 379, 383 (1971).

II. THE CITY HAS DIRECTED ITS CLAIM THAT THE DOG RACING ACT HAS NEITHER DISCRIMINATORY PURPOSES NOR EFFECTS TO THE WRONG AUDIENCE

Much of the City's brief is directed toward the proposition that the challenged portions of the Dog Racing Act do not discriminate against black voters. That argument is completely beside the point in a section 5 *coverage* case such as this one. That argument can properly be directed *only* to the Attorney General, in an administrative preclearance submission or to the United States District Court for the District of Columbia in a declaratory judgment action. *See* Jurisdictional Statement at 18-20.

A. *The City Seriously Distorts this Court's Analysis*

The City seeks to avoid the force of Congress' express statutory command by repeating the assertion of the court below that *de facto* preclearance can be given by a local district court when that court concludes that *it* sees no "potential for discrimination." *See* Motion to Dismiss or Affirm at 6. That assertion reflects a complete misreading of this Court's opinions in *NAACP v. Hampton County*, 470 U.S. 166 (1985); *Dougherty County*; *Georgia v. United States,* 411 U.S. 526 (1973); and *Perkins*.

First, contrary to the City's suggestion, the phrase "potential for discrimination" has not operated to limit the

definitional scope of § 5 to a subset of all election law changes; rather it has served to explain this Court's rejection of claims that various enactments did not involve "voting" in the first place. Thus, *Perkins* used the phrase to explain why changes in polling places and municipal boundaries can impede the ability to vote or dilute the impact of a voter's ballot; *Georgia v. United States* used it to reiterate why legislative reapportionments affect voting rights; *Dougherty County* used it to show why some school board personnel regulations can interfere with voting rights; and *Hampton County* used it to describe why even changes that seem to be "an improvement over prior voting procedures" requires preclearance. 470 U.S. at 180.

Second, those cases squarely reject the proposition that local district courts have any authority to inquire into the purpose or effect of a challenged procedure. The local three-judge court in *Perkins* had found that the particular polling place changes were necessary, resulted in the use of better facilities, and had no discriminatory motivation. This Court expressly disapproved that reasoning: "these considerations, so far as relevant, are relevant only to the questions reserved by § 5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia." 400 U.S. at 386. Similarly, in *Hampton County*, this Court made clear that even changes "undertaken in good faith" or that seem to be "an improvement over prior voting procedures" requires preclearance. 470 U.S. at 180: "More fundamentally, it is not our province, nor that of the [local] District Court below, to determine whether the changes ... in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia." *Id.* at 181.

Third, the City cannot exempt particular instances of arrangements already held subject to § 5 on the grounds that, in its estimation, the particular arrangements it has devised do not have the potential for discrimination. This Court's cases make clear that when it holds that a particular type of enactment must undergo preclearance, it is holding that *all* such enactments *always* require preclearance. In *Perkins*, for example, the Court made clear that its ruling was completely independent of the actual polling places selected by Canton, Mississippi: "there *inheres* in the determination of the location of polling places an obvious potential for 'denying or abridging the right to vote on account of race or color.'" 400 U.S. at 388 (emphasis added); *see also id.* at 389 ("a potential for racial discrimination in voting ... inheres in a change in the composition of the electorate affected by an annexation"). Today, therefore, *all* polling places changes must be precleared. 28 C.F.R. § 51.13(d). Similarly, in *Georgia v. United States,* the Court made clear that *all* legislative reapportionments undertaken by covered jurisdictions fall within § 5. 411 U.S. at 534-35.[3]

The import of this categorical approach for this case is obvious. Based on the decisions of this Court, the Attorney General (whose views this Court has found to be entitled to great deference, *see* Jurisdictional Statement at 10)[4] has concluded that the potential for discrimination is

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[3] The Court in *Georgia v. United States* relied on *Whitcomb v. Chavis,* 403 U.S. 124 (1971) -- a case involving reapportionment in Indiana -- for the proposition that multimember districts have the potential for discrimination in general. *See Georgia v. United States,* 411 U.S. at 534.

[4] In light of the special role played by the Attorney General in administering and enforcing § 5, it might be appropriate

sufficiently inherent to require preclearance of legislation requiring special elections, 28 C.F.R. § 51.13(j); legislation de-annexing parts of a city for election purposes, 28 C.F.R. § 51.13(e); and legislation setting the dates for special elections, 28 C.F.R. § 51.17(b). It is simply not open to local district courts to revisit those judgments by asking whether in a particular case, that potential for discrimination is likely to be realized.

The illogic of the City's position can be illustrated by a simple fact. The Attorney General reviews roughly 17,000 changes each year. *Clark v. Roemer,* 111 S.Ct. at 2104. Yet he interposes objections to only a few hundred. *See, e.g., Dougherty County,* 439 U.S. at 41-42 (in 1977, less than 2% of submitted changes led to objections); Attorney General Ann. Rep. 125, 131 (1986) (in 1986, Attorney General objected to 101 of 20,000 changes). Thus, literally thousands of changes are submitted each year which are precleared without difficulty. The reason these changes must be submitted is not because they are discriminatory; the vast majority clearly are not. Rather, it is because they fall within the definition set by Congress: they involve voting standards, practices, and procedures.

B. *If the City* Had *Submitted the Dog Racing Act for Preclearance, the Attorney General Might Well Have Found it to be Discriminatory*

The question whether the challenged provisions of the Dog Racing Act are actually discriminatory is not properly before this Court. The sole issue in this proceeding is whether preclearance is required. But, contrary to the City's obfuscations, if the Attorney General *had* been

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in this case to call for the views of the Solicitor General.

asked to review the changes at issue here, he would have had strong reason to refuse preclearance.

The City argues from the results of the unprecleared election that, since black voters supported greyhound racing, there was no discrimination. *See* Motion to Dismiss or Affirm at 6 and 8. Reasoning backward from the results of an unprecleared election is not, however, a sound basis for finding no violation of the Voting Rights Act. *Cf. Clark v. Roemer,* 111 S.Ct. at 2102 ("[v]oters may be ... inclined to avoid the polls when an election is held in conceded violation of federal law"). If the election was conducted on terms that violated the Act, or which the Attorney General would have found to be discriminatory -- had he been asked -- then its results should hardly be taken to justify the violation. And there is ample reason to suppose that he would have found these arrangements discriminatory.

This is shown by the very figures the City trumpets. A review of the Appendix to the City's Motion shows that at the time of the special election, there were 76 precincts in which 90 percent or more of the registered voters were white, and 41 in which 90 percent or more of the registered voters were black. Among the thirteen one-race precincts with turnout of over 50 percent, only one was black, while twelve were white. At the other extreme, of eleven precincts with turnout of less than one-third of registered voters, eight were black and only three were white. Another comparison is equally revealing: in each of the ten white precincts with the largest numbers of registered voters, turnout was over 40 percent, while of the ten most populous black precincts, five had turnouts below 40 percent. Put simply, black turnout was lower than white turnout. If Birmingham's black community really did favor greyhound racing, it was disadvantaged by the gap in

actual participation in the August special election.

It has long been recognized that special elections depress voter turnout. *See, e.g., Hampton County,* 470 U.S. at 178; *see also* Appendix to Motion to Dismiss or Affirm at A-9. It is entirely possible that the gap between black and white turnout in Birmingham was exacerbated by the decision to conduct the greyhound referendum in August rather than during the upcoming general election.

Moreover, the testimony of Mayor Richard Arrington -- on whose bona fides the City places such heavy reliance, *see* Motion to Dismiss or Affirm at 8 -- at least suggests that this depressed turnout was not entirely unintended:

> Q: Did you see any adverse effect or a potential adverse effect that could occur to you if dog racing was in fact on the same date that your election was?
>
> . . . . .
>
> A: Yes, based on my experience in politics, twenty years here in this city, I thought it could have an adverse effect on me, on my race, and on the black voter turnout, on both I felt it could, because in the black community the ministers play a key role and they've been very important in supporting me, and I was aware from my discussion with some of the ministers that they were concerned about the greyhound racing issue, that was one thing, and I did not want to be in a race where the ministers were on one side and I'm on the other side at the time I'm running.

Transcript of Aug. 22, 1991, Hearing at 32.

The implications of the Mayor's statement belie his

self-serving protestations that he hoped to increase voter turnout by isolating the two elections from one another. His real concern seems to have been to avoid having pro-Arrington, anti-greyhound black ministers lead their followers to the polls on an occasion when they could vote both for the mayor and against the dog track. In short, he hoped the (presumably) black congregants of black ministers who opposed dog racing would not turn out to defeat the referendum.

Again, whether there was a discriminatory purpose behind the way in which the election was scheduled, or whether the scheduling had an actual discriminatory effect, is irrelevant to the present inquiry. Clearly, there is the *potential* for such discrimination. The proper forum for determining whether there was actually discrimination is the preclearance process.[5]

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[5] The City also argues that the exclusion of the Shelby County portions of Birmingham from the referendum electorate had no potential for discrimination, because the Shelby County annexation is 98.78% white. *See* Motion to Dismiss or Affirm at 7. That argument completely ignores this Court's analysis in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987). There, this Court affirmed the denial of preclearance to a proposed annexation of virtually vacant land by an essentially all-white municipality. Given that the boundary change was actually discriminatory, *a fortiori* it had the "potential for discrimination." The record below contains no details about the size of the Shelby County annexation, or about projected demographic developments within the area. It is entirely possible that at some point in the future, before Birmingham approves pari-mutuel betting on greyhound racing, a significant number of black voters might move into the Shelby County portion of the city, and thereby be disenfranchised from voting in a dog-racing referendum. Given that possibility, there is an obvious potential for discrimination. As we say, the record before this Court and the court below is completely empty of the facts necessary to assess this possibility. But these are precisely the kind of facts that the Department of Justice, in

III. THIS CASE IS NOT MOOT

The City suggests, without citation to a single authority, that this case is moot because the proposal to authorize greyhound racing in Birmingham was defeated at the special election held on August 27, 1991. This Court should look to the court below, which knew perfectly well that this case was not rendered moot, as its order ruling against appellant on the merits of her motion for reconsideration after the election showed. *See* App. to Juris. St. at A-24 to A-28.

As the district court recognized, the defeat of the proposal means this case is very much alive. Section 4(d) of the Dog Racing Act, Code of Ala. 11-65-4(d) (Michie Supp. 1991), provides that "[o]ne or more subsequent elections may be requested ... if the question submitted at the preceding election ... does not receive the required majority"; at each such election, the same provisions challenged here -- specifically the disenfranchisement of certain city residents, the form of the questions to be presented, and the ban on conducting the referendum in tandem with mayoral or councilmanic elections -- will govern.[6] Thus, this case is no more moot than was *Clark*

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administrative preclearance or in defense of a declaratory judgment action in the District of Columbia, would ascertain. Their absence from this record merely demonstrates that this is the wrong forum in which to resolve this question.

[6] Appellant recognized that her claim that the choice of August 27, 1991, for the initial referendum was rendered moot, and accordingly did not press that claim before this Court. *Cf. Watkins v. Mabus*, 60 U.S.L.W. 3358 (Nov. 12, 1991) (No. 91-434) (dismissing, on *Munsingwear* grounds, a § 5 claim involving absentee ballot procedures adopted for an already completed election).

v. Roemer, which this Court decided last Term. There, plaintiffs sought preclearance for a number of changes adopted in the 1960's or 1970's. 111 S.Ct. at 2099. Although elections had occurred under the unprecleared changes, the *prospect* that future elections would occur under the changes meant that the case was entirely alive. Indeed, but for the precedential value of the opinion below, any other black voter in Birmingham remains free to initiate his or her own § 5 lawsuit against the various election-law changes enacted as part of the Dog Racing Act.[7]

Moreover, this Court has long recognized that, precisely because election laws outlive the individual elections they govern, challenges to those laws are not rendered moot by the occurrence of individual elections. The Court has repeatedly treated election-law challenges as "'capable of repetition, yet evading review' .... [as long as] the laws in question remain on the books," *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). *See also, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983) (same); *Storer v. Brown*, 415 U.S. 727, 737 n. 8 (1974) (same); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5 (1973) (same). As Judge Friendly recognized, challenges to laws governing special elections are "peculiarly" subject to this problem because of "the very speed" with which they are announced and conducted. *Montano v. Lefkowitz*, 575 F.2d 378, 382 (2d Cir. 1978). This case illustrates precisely that problem. The Dog Racing Act became law on July 28, 1991, and the City and County were able to

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[7] If this Court *does* conclude that this case is moot, then the judgment of the court below should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

pass resolutions setting an election date less than one month later. It is clearly impossible to litigate an entire § 5 case, including resolution of coverage issues by this Court, in 30 days. Yet Birmingham and Jefferson County retain the authority to set dog racing referenda elections a mere 30 days beforehand once a year until such a referendum passes. If, as the City implicitly concedes in the final paragraph of its argument, "[a]ppellant ... is free to seek to enjoin any such election or, if held, to seek a declaration voiding or nullifying the election results," Motion to Dismiss or Affirm at 9, then she is free to maintain this lawsuit as well.

CONCLUSION

For the reasons stated in this Brief and in the Jurisdictional Statement, this Court should either note probable jurisdiction or summarily reverse the judgment below.

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